

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 05-06002-01-CR-SJ-GAF
)	
)	
LISA M. MONTGOMERY,)	
)	
Defendant.)	

SUGGESTIONS OF THE UNITED STATES IN OPPOSITION TO DEFENDANT'S
MOTION TO AMEND SCHEDULING ORDER AND TO CONTINUE TRIAL DATE

The United States of America, by and through Todd P. Graves, United States Attorney, Roseann Ketchmark, First Assistant United States Attorney, and Matt J. Whitworth, Deputy United States Attorney, requests that the Court enter an order denying Defendant's Motion to Amend the Scheduling Order and to Continue the Trial Date in the above-styled cause of action.

I. Introduction

The United States opposes the request of defendant to continue her trial to February 2007. The above case has been specially set for jury trial before this Court since February 2005. At that time, this Court advised counsel that the parties should prepare for trial to begin on April 24, 2006. The United States stands ready to proceed on that date and further suggests there is more than adequate time remaining before trial for defense counsel to be prepared to meet their constitutional obligations to provide a sufficient defense for defendant.

Indeed, defendant's own motion concedes the United States has gone far beyond what is required by law to be provided to an accused under the Federal Rules of Criminal Procedure and applicable case law governing discovery in criminal cases. Defendant's motion also

demonstrates there is very little discovery remaining which needs to be provided to defense counsel. Further, the United States will provide virtually all of the remaining few items of discovery, only recently requested by defendant, in the near future.¹

Defendant is represented by three very skilled and experienced criminal defense attorneys and also has revealed in her motion that she has employed three mitigation experts to assist her in her pretrial investigation and defense at trial. It is simply not credible to suggest that these skilled and experienced attorneys cannot be prepared to defend the charges against defendant when they have already had over a year to begin preparation for the defense of this case and have nearly five additional months before this case is scheduled for jury trial.

Finally, the family members of the murder victim, Bobbie Jo Stinnett, have painfully awaited for the trial of this case and justice dictates, and the United States respectfully requests, that this Court enter an order denying defendant's motion to continue her trial until February 2007.

II. Legal Authority

A district court's decision to deny a motion for continuance can be reversed on appeal only for an abuse of discretion. *United States v. Yockel*, 320 F.3d 818, 827 (8th Cir. 2003).

When determining whether to grant a continuance, the relevant factors to consider include:

¹ On November 30, 2005, Ms. Hunt requested a few additional items of evidence which have been in the possession of the FBI. The United States is in the process of gathering those items and plans to make them available during the week of January 9, 2006. Some of the items requested, such as internal FBI communications, are clearly not discoverable and will not be provided. *See* Fed. R. Crim. P. 16(a)(2); *United States v. Koskerides*, 877 F.2d 1129, 1133-34 (2d Cir. 1989); *United States v. Roach*, 28 F.3d 729, 734 (8th Cir. 1994).

1. The nature of the case and whether the parties have been allowed adequate time for pretrial preparation;
2. The diligence of the party requesting the continuance;
3. The conduct of the opposing party and whether a lack of cooperation has contributed to the need for a continuance;
4. The effect of the continuance and whether a delay will seriously disadvantage either party; and
5. The asserted need for the continuance, with weight to be given to sudden exigencies and unforeseen circumstances.

Yockel, supra, at 827; *United States v. Issghoolian*, 42 F.3d 1175-78 (8th Cir. 1994).

Applying the above legal standards, it is clear defendant has not met her burden necessary to justify a continuance from the long-scheduled and specially set trial date of April 24, 2006.

The combined skills and expertise of her three defense attorneys, three retained mitigation experts, and other significant resources available in the Federal Public Defender's Office make defendant's claims in support of her request for a continuance until February 2007 ring hollow.

Although the case involved is a capital case, it is disingenuous to suggest that a jury trial scheduled approximately 17 months after the defendant was initially charged, on December 17, 2004, by complaint, is not sufficient time to prepare for trial. This is particularly true in light of the fact that the United States to date has provided approximately 2,282 pages of discovery to defendant. In fact, of the 2,282 pages provided to date, the United States voluntarily provided 2,137 pages of discovery to defense counsel by May 20, 2005. See Exhibit L.

The remaining few items of discovery were only recently requested by defense counsel and will be provided in the near future. It should be noted, however, that the items only recently requested by defense counsel on November 30 have been available to defense counsel for review

since the spring of 2005 when government counsel invited defense counsel to review evidence at the FBI at anytime.

III. Factual Background

On December 16, 2004, the defendant tricked Bobbie Jo Stinnett into a meeting at her home in Skidmore, Missouri, by using the false name of “Darlene Fischer,” claiming she was interested in purchasing a rat terrier dog from Ms. Stinnett. Shortly after entering Ms. Stinnett’s home, the defendant strangled Ms. Stinnett with a rope and removed her 8-month-old infant (Victoria Jo Stinnett) from her womb through the use of a common kitchen knife. The defendant then kidnapped the infant and drove her from Skidmore, Missouri to her home in Melvern, Kansas. Following an intense investigation by law enforcement authorities, the defendant was arrested in Melvern, Kansas, and charged by complaint on December 17. When confronted by investigators defendant confessed to the murder and kidnapping. A federal grand jury returned an indictment on January 12, 2005. A jury trial was originally set under the Speedy Trial Act for March 14, 2005. The Court made the parties aware in February 2005 that it would be available to try the case on April 24, 2006. Following discussion with defense and government counsel, the Court set this matter for trial on April 24, 2006.

A. Qualifications of and Continuity of Defense Representation

Nearly one year ago, at the arraignment on January 20, 2005, government counsel announced that it intended to seek permission from the Department of Justice to pursue the death penalty against defendant. As a result, the court appointed an experienced criminal capital litigator, Susan Hunt, as counsel “learned in the law of capital cases” pursuant to 18 U.S.C. § 3005. Shortly thereafter, defendant retained a mitigation specialist to assist in preparation for

trial. The court had previously appointed the Federal Public Defender's Office to represent defendant and has continued the Public Defender's involvement in the defense even after the appointment of Ms. Hunt. Initially, Assistant Federal Public Defender Anita Burns was involved in representation of the defendant along with First Assistant Federal Public Defender David Owen, Jr. Although Ms. Burns later withdrew from representation of defendant, Mr. Owen and Ms. Hunt have both continually been involved in her defense since January and February 2005 respectively.² Further, on October 7, 2005, Judy Clarke, Federal Defender Capital Resource Counsel from San Diego, California, entered her appearance on behalf of defendant. Ms. Clarke is nationally recognized as an expert in the field of capital defense and has vast experience in the representation of defendants accused of capital crimes. Ms. Hunt also has substantial experience in the representation of individuals accused of capital crimes. Finally, although Mr. Owen does not have any prior capital defense experience, Mr. Owen is the First Assistant Federal Public Defender and has a tremendous amount of jury trial experience and has represented scores of individuals accused of complex, serious, and violent felonies. Consequently, defendant's claim that her team of defense attorneys cannot be prepared for a trial which is not scheduled until April 24, 2006, and in which they have had nearly one year to date to prepare for, is not well-founded.

B. Discovery Provided by the Government

Although the Federal Rules of Discovery do not require the government to provide copies of witness statements to a criminal defendant, the United States has provided copies of witness

² The continuity of the defense representation in this case is a factor which this Court should consider when weighing the merits of defendant's request for a continuance of the trial date.

statements and began doing so as early as January 27, 2005. See attached Exhibit A. Additional discovery was provided on February 1 (Exhibit B), February 8 (Exhibit C), February 9 (Exhibit D), February 11 (Exhibit E), February 16 (Exhibit F), February 18 (Exhibit G), March 1 (Exhibit H), March 10 (Exhibit I), March 28 (Exhibit J), May 5 (Exhibit K), and by May 20, 2005, 2,137 pages of discovery had been provided to defense counsel to assist defendant in her preparation for trial (Exhibit L). Additional discovery concerning a former inmate housed with defendant was provided on October 17, 2005. Transcripts of the grand jury witnesses who testified were provided on November 16, 2005 (Exhibit M). Additional discovery was provided to defendant after government counsel received it in December 2005 (Exhibits N and O).

On April 26, 2005, defense counsel Hunt wrote a letter to the government requesting the following documents:

1. All work records and personnel files of the defendant;
2. Copies of all documents and papers seized from her car, including Post-It notes, receipts and copies of any documents and papers from her purse and wallet;
3. Copies of the photographs of the car and the evidence contained therein.

In response, on April 27, 2005, Deputy U.S. Attorney Whitworth wrote to Ms. Hunt inviting defense counsel to meet at the FBI to review all of the evidence and to make copies available of any items requested. (Exhibit P.)

Consequently, while the court's Scheduling Order did not require the government to produce these items until May 29, 2005, the government complied with its discovery obligations with respect to these items by April 27, 2005. In spite of this offer, defense counsel did not make arrangements to meet at the FBI until August 11, 2005. Following the review of the evidence on

August 11, defense counsel made additional requests for copies of recordings from seized video recorders, cameras, photos from cell phones, computer disks, and a large amount of documents and papers recovered from defendant's residence and automobile. As a result, many of the items requested have been produced and the United States has made all of the documentary evidence available to defense counsel to copy at the offices of the FBI. Under Rule 16, a defendant may inspect, copy, or photo documents, books, papers, and tangible objects within the actual possession, custody, or control of the government that are material to the defendant's case, intended for use by the government as evidence at trial, or are owned by or were obtained from the defendant. Fed. R. Crim. P. 16(a)(1)(E).

Here, investigators seized hundreds of documents, papers, receipts, and other miscellaneous documentary objects from the defendant's automobile and home. The vast majority of the items seized have no evidentiary value at all and were obviously seized by investigators out of an abundance of caution that the items might have some sort of evidentiary value which could be determined at a later time. The United States is not required to physically make copies of these items for the defense if the items are made available for defense inspection and review. The defense was informed that it could make its own copies of these items of evidence and, in fact, defense counsel have exercised that option.³

In correspondence dated November 30, 2005, defense counsel requested additional items of evidence which were in the possession of the FBI. The United States advises that it is

³ In *United States v. Tindle*, 808 F.2d 319, 322-23 (4th Cir. 1986), the court held the government was not required to copy and release thousands of business and financial records when the court permitted the defendant access to all records and an opportunity to copy those that were relevant.

attempting to comply with each and every request contained in the defense discovery letter of November 30 and will make available to the defense virtually all of the remaining items during the week of January 9, 2006.

The only remaining item of discovery which has not been produced and which the United States is required to produce, will be some additional DNA testing which the government has asked the Kansas City Crime Laboratory to complete relating to items of evidence seized from the defendant's automobile and found on the victim Bobbie Jo Stinnett. It is anticipated this additional testing will be completed by the end of January 2006. However, it should be noted that the vast majority of the DNA testing has already been completed and the results were turned over to the defense on December 13, 2005.

The Kansas City Crime Laboratory DNA testing has already concluded that DNA recovered from left hand nail scrapings of the defendant at the time of her arrest contains DNA of both Bobbie Jo Stinnett and defendant. DNA found on a bloody rope with hair attached to it recovered from the automobile trunk of defendant is the DNA of Ms. Stinnett. An analysis of a kitchen knife recovered from defendant's automobile trunk which defendant identified as being used to cut Ms. Stinnett's baby from her womb revealed that blood recovered from the right side of the knife's blade contains DNA consistent with a mixture of Ms. Stinnett's and her child's (Victoria Jo Stinnett) DNA. An analysis of the handle of the knife indicated genetic information from at least three individuals, that is, Bobbie Jo Stinnett, Victoria Jo Stinnett, and defendant. It should be noted that at the time defendant was arrested investigators noticed numerous cuts on her fingers. Photographs were taken of the cuts on defendant's hand and account for the presence of defendant's DNA on the knife handle. The Crime Laboratory also determined that

Victoria Jo Stinnett was the source of the placental blood collected from the body of Bobbie Jo Stinnett at the hospital. Victoria Jo Stinnett was recovered from the arms of the defendant at her home in Melvern, Kansas on December 17, 2004.

Defendant did not make any specific requests for information relating to the DNA testing until it sent a letter to government counsel on November 30, 2005. The United States is in the process of responding to and gathering the information requested in defense counsel's letter of November 30 and all of the information will be provided before the end of January 2006. It should be noted, however, although it has been nearly a year since the murder of Bobbie Jo Stinnett, defense counsel still have not requested to have independent testing performed by its own experts on any of the items seized in this investigation by law enforcement authorities. The United States suggests that because of defendant's confession and the overwhelming weight of the evidence found in the trunk of the defendant's automobile, on her person, and in her home, it is obvious why defense counsel has not requested independent testing. Nevertheless, the United States stands ready and willing to provide any of the evidence it has recovered to qualified defense DNA experts for independent review.

It is evident from a review of the above discovery efforts undertaken by the United States that there is only a minuscule amount of discovery that has not yet been provided to defense counsel. The few items which have not been turned over will be turned over in the near future and there is more than adequate time for defense counsel to adequately prepare for trial on April 24, 2006.

C. Computer Evidence

In January 2005, the government provided defendant with disks that contained ENCASE reports of both defendant's and the victim's computers which were seized by investigators. In her motion, defendant alleges she cannot be prepared for trial because the government has not provided her with a "bit by bit" copy of the hard drives of the two computers seized. It should be noted that "bit by bit" copies of the hard drives were made available by the United States to defendant during the week of January 3, 2006. However, the fact that a "bit by bit" hard drive was not turned over to defendant until recently is no fault of the United States. Indeed, in a meeting on February 9, 2005, at 1:30 p.m. in the conference room of the United States Attorney, almost a year ago, Assistant Federal Public Defender Anita Burns and Susan Hunt were informed that both computers were available for imaging and that all they needed to do was to contact Mark Johnson at the Heart of America Regional Computer Forensics Laboratory (RCFL) in order to obtain a copy of the hard drives. The offer to make a copy of the computer hard drives was repeated on numerous occasions between February and December 2005. However, in spite of this offer, the Computer Systems Administrator for the Federal Public Defender's Office, Troy Schnack, did not drop off a hard drive to the RCFL until mid-December 2005. In addition, Mr. Schnack initially dropped off a 40 gig hard drive which was not capable of making copies of both computer hard drives. Consequently, Mr. Schnack was advised that it would be necessary to provide a 200 gig hard drive in order to capture images from both computers. Mr. Schnack did not provide the 200 gig hard drive until December 29, 2005. The copying process is now complete. To date, no explanation has been provided to government counsel as to why it took so long to provide a hard drive capable of copying the requested information.

Defense counsel state in their motion for a continuance that it will take the defense computer examiner at least three weeks to perform the forensic analysis and extract the data required to translate that information into a format capable of being understood by defense counsel. As a result, this process should be completed by the end of January 2006, which is two months and three weeks before the jury trial is scheduled to begin. As a result, it is disingenuous to contend that the earlier unavailability of the “bit by bit” hard drive evidence should somehow conflict with the scheduled trial date of April 24, 2006. This is particularly true in light of the fact that the ENCASE reports for Ms. Stinnett’s and the defendant’s computers completed by the RCFL, which are both very thorough, were made available to the defense in January 2005.

D. Notice of Intent to Seek the Death Penalty

Defendant also contends the government has failed to comply with the Scheduling Order’s time for filing of the Notice of Intent to Seek the Death Penalty. The Scheduling Order required that the notice of intent to seek the death penalty be filed on or before September 16, 2005. However, at the time the date was set, Chief Magistrate Judge Maughmer acknowledged that he did not believe there was any requirement in the Rules of Criminal Procedure or statutes which permitted him to set a specific time for the filing of the Notice of Intent to Seek the Death Penalty.⁴ However, Judge Maughmer believed that if he set a specific date it might be helpful in completing the review process at the Department of Justice. Nevertheless, any minimal delay in the filing of the Notice is not the fault of the government. Further, a formal Notice was filed on November 16, 2005, more than five months before the scheduled trial date.

⁴ The Federal Death Penalty Act requires the government to file a notice of intent to seek the death penalty “a reasonable time before trial or before acceptance by the court of a plea of guilty.” 18 U.S.C. § 3593(a).

Defense counsel also acknowledge that Deputy United States Attorney Whitworth advised at the arraignment on January 20, 2005, that he would recommend to the United States Attorney that the death penalty be sought in this matter. Mr. Whitworth also wrote a letter to Anita Burns, Susan Hunt, and David Owen, Jr., on February 7, 2005, formally advising them that it was his intention to request the United States Attorney to seek authorization from the Attorney General to seek the death penalty against Ms. Montgomery thus clearly placing defense counsel on notice that there was a strong probability this would be a capital case. (See attached Exhibit Q). Indeed, the Court also recognized the need to appoint qualified capital counsel because it was likely the case would be a capital prosecution and appointed Ms. Hunt in early February 2005.

Delay in the filing of the Notice of the Intent to Seek the Death Penalty can also be attributed to the fact that Ms. Hunt and Mr. Owen chose the very last date available, that is, September 26, 2005, to make their formal mitigation presentation to the Department of Justice's Capital Review Committee in Washington, D.C. Defense counsel were given a list of four to five dates to make a presentation in person in Washington, D.C. Defense counsel chose the very last date available despite being informed that choosing the last date available would cause the Notice of the Intent to Seek the Death Penalty to be filed after the September 15 target date. Defense counsel could have made the presentation to the Capital Review Committee by videoconference at an earlier date but felt it was important and preferred to make the presentation in person to the Capital Review Committee. When it became apparent that the government could not meet the September 15 date listed in the Court's Scheduling Order, government counsel with the consent of defense counsel contacted Chief Magistrate Maughmer to advise him of this

development. Judge Maughmer advised that he had no objection to delaying the filing of the Notice as long as the parties agreed. Subsequently, on November 16, 2005, the government filed its notice of intent to seek the death penalty.

Defense counsel have known that this case would likely be a capital prosecution since January 2005. Only the formal approval from the Attorney General occurred in November 2005. Consequently, the defense has more than five months from the filing of the Notice to prepare for trial.

To judge an accused's challenge to the reasonable timeliness of a Death Notice requires an evaluation of, among other factors that may appear relevant, (1) the nature of the charges presented in the indictment; (2) the nature of the aggravating factors provided in the Death Notice; (3) the period of time remaining before trial. . . , and (4) the status of discovery in the proceedings. *United States v. Ferebe*, 332 F.3d 722, 737 (4th Cir. 2003), *see also United States v. Breeden*, 366 F.3d 369 (4th Cir. 2004). Here, defendant is charged in a single count indictment and the aggravating factors charged virtually all relate to the crime itself. That is, there are no aggravating factors relating to prior criminal record or other bad acts of defendant which would require additional investigation. Finally, the trial is not scheduled to begin until April 24 and nearly all of the discovery has already been provided to defendant. Consequently, defendant's claim that the trial should be delayed because the Notice was not filed until November 15 fails.

E. Offer of Defense Counsel to Meet With the Court Without the Presence of Government Counsel

The United States objects to any *ex parte* communication with the Court concerning why defendant needs a continuance of the trial date. Defense counsel have requested to provide information to the Court *ex parte* concerning its investigative plan and to offer further reasons why it needs a continuance. Defense counsel contend the additional information is work product and should not be provided to government counsel. It would be unfair for the government to not be able to respond to contentions offered in support of a request for continuance.

F. Mitigation Investigation

The defense also contends that it needs more time to identify and prepare its mitigation evidence. However, scores of witness interviews have previously been provided to the defendant by the government. A large number of the interviews are of the defendant's family members, including her mother, children, husband, ex-husband, brothers, sister, and a multitude of friends, neighbors and acquaintances. Most of these interviews are lengthy and detailed and contain information, including contact information, which could be used to assist in the preparation of the mitigation defense. Most of the interviews also contain detailed information concerning the defendant's background. As a result, government investigators have already completed much of the work which can be used to assist the defense in its mitigation investigation. In addition, defendant has retained three mitigation investigators/experts to assist in her defense. Surely these investigators together with three highly competent defense attorneys can be prepared with more than four months remaining before trial.

G. Conclusion

Defendant's contention that a delay is necessary because of the government's failure to comply with the Scheduling Order is completely without merit. The government has gone above and beyond what is required under the rules of discovery and the defense will receive the few small items of discovery that remain within the next week. Because of the level of experience of the three defense attorneys assigned to this case, together with the three mitigation experts and additional resources from the Public Defender's Office, it is simply not reasonable that defendant cannot be ready for trial by the scheduled date.

Should the court proceed to trial on April 24, 2006, the defendant will have had over 17 months to prepare her defense. Consequently, the United States respectfully requests this Court enter an order denying the Defendant's Motion to Amend the Scheduling Order and to Continue the Trial Date.

Respectfully submitted,

/s/ Matt J. Whitworth

for Todd P. Graves
United States Attorney

/s/ Roseann Ketchmark

Roseann Ketchmark
First Assistant United States Attorney

/s/ Matt J. Whitworth

Matt J. Whitworth
Deputy United States Attorney

Charles Evans Whittaker Courthouse
400 E. 9th Street, Fifth Floor
Kansas City, Missouri 64106
Telephone: (816) 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on January 10, 2006, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

Susan Hunt
Attorney at Law
819 Walnut, Suite 413
Kansas City, Missouri 64106

David L. Owen, Jr.
Assistant Federal Public Defender
Federal Public Defender's Office
818 Grand, Suite 300
Kansas City, Missouri 64106

Judy Clarke
c/o Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101-5030

/s/ Matt J. Whitworth

Matt J. Whitworth
Deputy United States Attorney